Supreme Court, U.S.
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No. 93-584

In The

Supreme Court of the United States

October Term, 1993

S.J.T. INC., d/b/a T J SMILES,
and JAMES FENIMORE,

Petitioners,

v.

RICHMOND COUNTY, GEORGIA,
and CHARLES WEBSTER, SHERIFF,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

REPLY BRIEF

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REPLY BRIEF

The Respondents begin their Brief with a misleading, non-sequitur, that characterizes as non-existent Petitioners' liberty and property interests to offer nude dancing and sell alcohol. Respondents argue that "[t]he liquor license obtained by Petitioners does not establish any vested right, contractual or otherwise, to operate a bar and offer nude dancing." (Brief of Respondents at 1).

Even under Georgia law, the moment the Petitioner was granted a temporary license, the liberty and property interests created by the license to sell liquor vested.

> A liquor license is an entitlement to operate a business, a business upon which a person's livelihood is dependent. Furthermore, often, as in this case, substantial amounts of property are invested in the business that is dependent on the continuation of the license for its term.

Harris v. Entertainment Systems, Inc., 259 Ga. 701, 386 S.E.2d 140, 143 (Ga. 1989). This Court has recognized that licenses create interests which should be free from arbitrary state takings, as shown by the following:

> Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. . . . This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'.

Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971).

Petitioners have a standing Constitutional right to present erotic entertainment, an interest which could be said to vest upon existence of Petitioners' intention to present the same. *See e.g., California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (non-obscene nude entertainment protected); *see also, Barnes v. Glen Theater, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504, 511 (1991).

The factual premise of the Respondents' introductory argument is false. The Respondents assert, "at the time Petitioners obtained their liquor license, Richmond County's nude dancing ordinance was in full force and had the effect of expressly prohibiting Petitioners from offering nude dancing on the licensed premises." (Brief of Respondents at 1). In fact, the Ordinances in question were not yet enacted when Petitioners applied for and purchased their first licenses in 1991. The Commissioners of Richmond County approved Petitioners' alcohol, beer, wine and dancing licenses on July 9, 1991,[1] and Petitioners purchased them on July 10, 1991, (Brief of Petitioners, App. 20-21, ¶ 11), fully two months before the September 10, 1991 ratification of Richmond County, Georgia Ordinance 91-15, and one year prior to the September 1, 1992 enactment of Ordinance 92-5. (Brief of Petitioners, App. 35). Petitioners' state license was effective on a temporary basis on August 16, 1991, and on a

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[1] Although ¶ 11 in the Complaint, found in the Appendix of the Petition for Writ of Certiorari at 20, reads ". . . the Commissioners approved them on July 9, 1992 . . . ", the actual date of the County's first permanent approval was July 9, 1991. Plaintiff has sent a letter to the Chief Deputy Clerk of the United States Supreme Court explaining this error and correction.

permanent basis in October, 1991. (Brief of Petitioners, App. 21, ¶ 13). Both Richmond County and state licenses were renewed in 1992. (Brief of Petitioners, App. 21, ¶¶ 11-13).

Non-obscene dancing is protected, regardless of the subsequent passage of local ordinances like Richmond County's. Thus, Petitioners have both an ongoing right to perform and facilitate expressive nude dancing, and, through their alcohol licenses, a vested, protected interest in selling alcohol.

County Reads Ordinance to Ban Blue Collar Bar Nude Dancing, but Permit Theatrical Nude Dancing and Alcohol Consumption

Although the Respondents gloss over the Ordinance's arbitrary limitation of protected expressive activity based on an analysis of income from alcohol versus nonalcohol sources, their response brief makes their true intentions all too clear – an outright ban of nude dancing in blue collar bars, while sanctioning highbrow theatrical, nude dancing and alcohol consumption. They state that "Richmond County's nude dancing ordinance . . . had the effect of expressly prohibiting Petitioners from offering nude dancing on the licensed premises." (Brief of Respondents at 1). They interpret the Ordinance's action as the "prevention of nude, barroom dancing" or "*live* (italics original) 'adult' entertainment". (Brief of Respondent at 7). On the other hand, "Richmond County has not found it necessary to proscribe the combination of alcohol and brief depictions of nudity at 'mainstream' performance houses such as the opera, museums, and movie theaters." (Brief of Respondents 7-8). The State's highest

court, according to Respondents, has interpreted the ordinance to "serve the purpose of excluding establishments which do not derive most of their income from alcohol". (Petition for Certiorari, App. 7). The ordinance as interpreted by the County and the Georgia Supreme Court bans a broad spectrum of accepted blue collar entertainment.

Respondents argue that *Barnes v. Glen Theater, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) and *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 390 (1972) are controlling. (Brief of Respondent at 2-4). However, Petitioners assert both are distinguishable and not controlling. Unlike the Richmond County Ordinance, the state statute in *Barnes* did not arbitrarily and completely eliminate a genre of expressive activity, but left intact the erotic message by permitting dancing with minimal covering. *California v. LaRue*, diverges from the case at bar because California has a statewide constitutional and statutorily-based regulatory framework which gives a single liquor board statewide control. The California liquor board has prohibited live sexual entertainment and films in bars, and other establishments, licensed to dispense liquor by the drink. In Georgia, however, the State's, and therefore the County's, police power to regulate alcohol is limited by the Georgia Constitution's lack of a "constitutional equivalent of the Twenty-First Amendment." *Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E.2d 140, 142 (Ga. 1989). The County can offer no similar constitutional or statutory framework of uniform, state-wide regulation.

CONCLUSION

Notwithstanding the ordinance's facially objective measure of permitted nude entertainment at certain types of establishments, based on the alcohol versus non-alcohol gross income comparison, the ordinance is given a subjective reading by the Georgia Supreme Court and the County which would eliminate a band of speech on elitist and arbitrary grounds. Given *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993), and the decision appealed from herein, the Georgia Supreme Court has misinterpreted *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 89 (1986) and read into Georgia and Federal constitutional law the authority of each local government to ban a broad spectrum of non-obscene entertainment, instead of regulating and guiding its availability.

Certiorari should be granted to rein in the arbitrary takings of protected interests under the guise of a misused secondary effects doctrine, and then to establish bounds for judicious use of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 89 (1986). The challenged ordinance is an example of a new and mutant strain of local law using an arbitrary and irrational means to establish obscenity *de jure* anew. The ordinance bans an erotic message in one setting, yet permits the same message in a refined setting. Such troublesome distinctions have no place in the law.

Respectfully submitted this 29th day of November, 1993.

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